APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

FILED
December 13, 1999

No. 99-1793
CA-97-94-2

KAREN SUE CONNER
Plaintiff - Appellant

v.

BARBOUR COUNTY BOARD OF EDUCATION;
WILLIAM E. PHILLIPS; CHARLES ZINN;
F. EDWARD LARRY
Defendants - Appellees

On Petition for Rehearing En Banc

The appellant's petition for rehearing en banc was submitted to this Court. As no member of this Court requested a poll on the petition for rehearing en banc,

IT IS ORDERED that the petition for rehearing en banc is denied.

For the Court,

/s/ Patricia S. Connor
CLERK

APPENDIX B

UNPUBLISHED
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 99-1793

KAREN SUE CONNER,
Plaintiff-Appellant
versus

BARBOUR COUNTY BOARD OF EDUCATION;
WILLIAM E. PHILLIPS; CHARLES ZINN;
F. EDWARD LARRY,
Defendants-Appellees.

Appeal from the United States District Court for the Northern District of West Virginia, at Elkins. Robert Earl Maxwell, Senior District Judge. (CA-97-94-2)

Submitted: September 30, 1999
Decided: October 6, 1999
Before NIEMEYER, WILLIAMS, and MICHAEL, Circuit Judges

Affirmed by unpublished per curiam opinion.

Karen Sue Conner, Appellant Pro Se. Richard Michael Yurko, Jr., STEPTOE & JOHNSON, Clarksburg, West Virginia; Rodney Lloyd Bean, STEPTOE & JOHNSON, Morgantown, West Virginia, for Appellees.

Unpublished opinions are not binding precedent in this circuit.
See Local Rule 36 (c)

PER CURIAM:

Karen Sue Conner appeals the district court's order dismissing her Title VII complaint. We have reviewed the record and the district court's opinion and find no reversible error. Accordingly, we affirm on the reasoning of the district. court. See Conner v. Barbour County Board of Educ., No. CA-97-94-2 (N.D. W. Va. May 17, 1999). We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process.

AFFIRMED

APPENDIX C

Filed May 17, 1999

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF WEST VIRGINIA
AT ELKINS

KAREN SUE CONNER,

Plaintiff,

v. **CIVIL ACTION NO.:2:97CV94**

BARBOUR COUNTY BOARD OF EDUCATION, et al.,

Defendants.

DISMISSAL ORDER

On October 27, 1997, Plaintiff Karen Sue Conner filed her Complaint in this case, *pro se*, alleging harassment and unfair treatment during her tenure as a bus driver employed by the Barbour County Board of Education, and seeking $2 million in compensatory damages and other non-economic relief. Defendants filed a timely Answer to the Complaint in which they denied liability on any of Plaintiff's claims and affirmatively asserted that Plaintiff's action was barred by the applicable statute of limitations and by the doctrines of estoppel and assumption of risk.

Plaintiff later retained counsel and amended her Complaint with leave of Court. In her Amended Complaint, Plaintiff alleged, in three counts, that (1) Defendants failed to reasonably accommodate Plaintiff's religious preferences; (2) Defendants sexually harassed Plaintiff; and (3) Defendants discharged Plaintiff in retaliation for Plaintiff's request for religious accommodation and because

Plaintiff has filed grievances against the defendants. In her Amended Complaint, Plaintiff prayed for $100,000 in compensatory damages on each of the three counts asserted, as well as punitive damages. In response to the Amended Complaint, Defendants denied any liability to Plaintiff and affirmatively asserted the defenses that the action was barred by the statute of limitations, by the doctrines of res judicata, collateral estoppel and immunity, and by Plaintiff's failure to exhaust administrative remedies.

After two unsuccessful attempts at mediation of the case, the parties informed the Court, by counsel, that the case involved certain legal issues which presented impediments to its amicable resolution. The Court ordered that the parties brief these legal issues so that they could be resolved by the Court. In accordance with the Court's briefing order, Defendants filed a "Memorandum On Legal Issues To Be Resolved By The Court" and Plaintiff thereafter filed a "Reply To Defendants' Memorandum On Legal Issues To Be Resolved By The Court." At a hearing held April 14, 1999, the Court heard argument on these outstanding legal issues. Plaintiff appeared at the hearing by her counsel, J. Lawrence Hajduk, and Defendants appeared by their counsel, Richard M. Yurko, Jr. and Rodney L. Bean.

Having carefully considered the parties briefs and the argument of counsel, the Court makes the following findings of fact and conclusions of law:

Findings Of Fact [1]

1. Plaintiff was employed by the Barbour County Board of Education ("the Board") as a school bus operator from 1978 until 1995. For seven years, from 1985 until 1992, Plaintiff was certified and employed as an instructor of bus operators. As an instructor of bus operators, Plaintiff was provided with instructional programs dealing with accidents and emergencies.

2. During her years of employment with the Board, Plaintiff was suspended for two days in 1980 for fighting, suspended for another four days in 1985 for striking her immediate supervisor, and began the 1994-1995 school year under a 30 day suspension without pay due to yet another confrontation with her immediate supervisor at the end of the 1993-1994 school year, in which her insubordination included calling her immediate supervisor a "dirty bastard" in the presence of another employee.

3. On December 12, 1994, Plaintiff was transporting 46 elementary, middle school, and high school children home on her evening route when she collided with another vehicle on a one-lane bridge. The road on which the accident occurred was narrow with steep banks on each side and dangerous to walk along.

4. Immediately after the accident and without making any attempt to call for back up transportation, Plaintiff opened the bus door and left it open for students to freely exit the bus. Students of all ages exited the bus. Some students left the scene by catching rides with parents, relatives,

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[1] The Court's Findings Of Fact are adopted largely from the decision of the Supreme Court of Appeals of West Virginia in Karen Sue Conner v. Barbour County Board of Education, 200 W. Va. 405, 489 S.E.2d 787 (1997).

friends, neighbors or boyfriends. Plaintiff also allowed 14 students to ride home in a minivan. Two sisters, ages approximately 8 and 11, attempted to walk to their home eight miles away without Plaintiff's knowledge and were picked up by the Superintendent (Defendant Phillips) and Transportation Director (Defendant Zinn) approximately one-half to three-fourths of a mile from the bus. By the time the Superintendent and the Transportation Director arrived only 30 minutes or so after the accident, just four of the older students remained at the scene.

5. After the accident, without checking on each child for injuries, Plaintiff signed a release form for the Emergency Medical Squad indicating that no one was injured, although at least one student bumped her head and missed the next day of school as a result. Plaintiff also failed to place reflective triangles on the road to caution other drivers. Furthermore, Plaintiff was unable to accurately recall which students were on the bus at the time of the accident and how the students got home.

6. Superintendent Phillips recommended to the Board that Plaintiff be dismissed from employment based on her conduct, specifically: failure to locate warning devices; failure to properly notify school officials; failure to request back up transportation; failure to secure proper releases from students regarding their physical condition; and permitting various students to exit the bus and leave the scene without knowledge of their destination and with whom they left. In summary, the Superintendent found that Plaintiff failed to maintain control of the students in accordance with the appropriate rules and regulations. The Superintendent considered recommending discipline of less than termination, but because of the serious concern of the safety of the children, the complaints of parents over the

handling of students following the accident, the serious nature of Plaintiff's conduct and her failure to follow emergency regulations of which she was aware due to her training and prior employment as a Bus Operator and Bus Driver Instructor, the Superintendent found dismissal to be warranted.

7. At a hearing of the Barbour County Board of Education on January 17, 1995, at which Plaintiff appeared in person and by counsel, Plaintiff testified that she did not realize that she did anything wrong. The Board concluded that her employment should be terminated based on her conduct, particularly because Plaintiff placed the safety of the students in grave danger, and she was discharged on January 23, 1995.

8. Plaintiff grieved her discharged, and hearings were conducted before an Administrative Law Judge with the West Virginia Education and State Employees Grievance Board ("ALJ"). By order entered September 29, 1995, the ALJ found that the Board had proven Plaintiff's failure to maintain proper control over the students and that Plaintiff had permitted the students to go home with persons other than their parents, without permission slips and at a spot other than their designated bus stop. [2] The ALJ, however, reduced the penalty from discharge to suspension without pay from January 23, 1995 through September 30, 1995.

9. Both Plaintiff and the Board appealed to the Circuit Court of Barbour County, West Virginia. By order entered April 19, 1996, Judge Waters affirmed the ALJ's findings of fact but reversed the determination regarding suspension. Instead,

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[2] The Administrative Law Judge's precise finding was that Plaintiff "did not have control of the children as they freely exited the bus and milled around outside the bus. This lack of control compromised the safety of the students, particularly those of elementary age."

Judge Waters upheld the Board's original discharge decision.

10. Plaintiff then appealed to the West Virginia Supreme Court of Appeals. In her appeal, Plaintiff alleged that the Board did not prove its assertion that Plaintiff failed to maintain proper control of the students. Plaintiff also argued that the discharge was an excessive penalty; that the discharge was retaliatory; and that Plaintiff was entitled to an improvement period. In its decision, the West Virginia Supreme Court of Appeals found no merit to any of Plaintiff's allegations and affirmed the Circuit Court's decision.

Conclusions Of Law

1. Because this Court's jurisdiction of this case is based on its alleged presentation of a federal question, Am. Compl. ¶7; see 28 U.S.C. § 1331, the Court must apply federal law rather than state law in resolving the issues the case presents. *See generally* Erie Railroad Co. v. Thompkins, 304 U. S. 64 (1938). The extent to which a federal court must attach preclusive effect to a prior state court proceeding is a federal question controlled by Erie and its progeny, as well as 28 U.S.C. § 1738. Adam v. Saenger, 303 U.S. 59, 64 (1938); American Mannex Corp. v. Rozands, 462 F.2d 688 (5th Cir. 1972); Haislip v. Riggs, 534 F. Supp. 95, 99 (W.D.N.C. 1981).

2. In 28 U.S.C. § 1738, Congress directed that judicial proceedings of a court of any state "shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken." Where a valid final decision has been adjudged against the Plaintiff in a state court having jurisdiction over the persons and the

cause of action, the doctrine of *res judicata* has been held to bar relitigation by the Plaintiff against the same person in a federal court of that state. Cobb v. Clark, 257 F.Supp. 175 (M.D.N.C. 1966), *aff'd*, 375 F.2d 773 (4th Cir. 1967); Brown v. Chastain, 416 F.2d 1012 (5th Cir. 1969), *cert. denied*, 397 U.S. 951 (1970); *Haislip*, 534 F. Supp. at 99.

3. In 28 U.S.C. § 1738, Congress directed that judicial proceedings of a court of any state "shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken." Where a valid final decision has been adjudged against the Plaintiff in a state court having jurisdiction over the persons and the cause of action, the doctrine of *res judicata* has been held to bar relitigation by the Plaintiff against the same person in a federal court of that state. Cobb v. Clark, 257 F.Supp. 175 (M.D.N.C. 1966), *aff'd*, 375 F.2d 773 (4th Cir. 1967); Brown v. Chastain, 416 F.2d 1012 (5th Cir. 1969), *cert. denied*, 397 U.S. 951 (1970); Haislip, 534 F. Supp. at 99.

4. The requirements for invoking the doctrine of *res judicata* to preclude a subsequent lawsuit by bar or claim preclusion are familiar one. "As applied, the essential elements of the doctrine are generally stated to be (1) a final judgment on the merits in an earlier suit; (2) an identity of the cause of action in both the earlier and the later suit; and (3) an identity of the parties or their privies in the two suits." Keith v. Aldridge, 900 F.2d 736, 739 (4th Cir. 1990)(quoting Nash City Board of Education v. Biltmore Co., 640 F.2d 484, 486 (4th Cir. 1981)).

5. Our Court of Appeals has broadly applied the doctrine of *res judicata* to preclude claims in a second action. In Aliff v. Joy Manufacturing Co., 914 F.2d 39, 43 (4th Cir. 1990), the court found two causes of action were "sufficiently the same when the second claim 'arises out of the same transaction or series of transactions as the claim resolved the prior judgment.' " The Court held that "'[R]*es judicata* precludes litigation by the Plaintiff in a subsequent action of claims with respect to all or any part of the transaction, or series of connected transactions, out of which the first action arose.' " Id. (quoting Harnett v. Billman, 800 F.2d 1308, 1313 (4th Cir. 1986)); *accord*, Aldridge, 900 F.2d at 740.

6. Similar to the doctrine of *res judicata* is the doctrine of collateral estoppel, also known as issue preclusion. The primary difference between *res judicata* and collateral estoppel is that while the former focuses on the precise cause of action adjudicated in the prior proceeding, the latter focuses on the issues which were litigated in the prior proceeding without regard to the cause of action involved. The United States Supreme Court has defined collateral estoppel as simply meaning "when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any lawsuit. Ashe v. Swenson, 397 U.S. 436, 443 (1970). The Fourth Circuit has held that "[c]ollateral estoppel or issue preclusion forecloses 'the relitigation of issues of fact or law that are identical to issues which have been actually determined and necessarily decided in prior litigation in which the party against whom [collateral estoppel] is asserted had a full and fair opportunity to litigate.' " Ramsay v. U.S.I.N.S., 14 F.3d 206, 210 (4th Cir. 1994) (quoting Virginia Hosp. Ass'n v. Baliles, 830 F.2d 1308, 1311 (4th Cir. 1987)].

7. In this Circuit, a party asserting collateral estoppel must establish the following elements: (1) that the issue precluded is identical to one previously litigated; (2) that the issue was actually determined in the prior proceeding; (3) that determination of the issue was a critical and necessary part of the decision in the prior proceeding; (4) that the prior judgment was final and valid; and (5) that the party against whom estoppel is asserted had a full and fair opportunity to litigate the issue in the previous forum. Ramsay. 14 F.3d at 210

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8. The law is clear in the Fourth Circuit that an administrative proceeding can be the basis for invoking the doctrines of *res judicata* and collateral estoppel. *E.g.* United States v. Utah Construction and Mining Co., 384 U.S. 394 (1966); North Carolina v. Chas. Pfizer & Co., 537 F.2d 67 (4th Cir.), *cert denied*, 429 U.S. 870 (1976); Harrah v. Richardson, 446 F.2d1 (4th Cir. 1971); Moore v. Allied Chemical Corp. 480 F. Supp. 377 (E.D. Va. 1979). The key factor in determining when an administrative action can constitute *res* judicata or collateral estoppel is whether the agency involved "is acting in a judicial capacity and resolves disputed issues of fact properly before it which the parties....had adequate opportunity to litigate...(in that) both parties had a full and fair opportunity to argue their version of the facts and an opportunity to seek court review of any adverse findings." Utah Construction, 384 U.S. at 422; Moore, 480 F. Supp. At 383.

9. In light of these principles, it is beyond dispute that Plaintiff's cause of action for retaliatory discharge is barred. Plaintiff raised the identical cause of action during her grievance proceeding

The ALJ concluded that Plaintiff made a prima facie case for retaliation based upon the fact that she had filed 14 grievances during her tenure, but found that the Board had rebutted her prima facie showing "by offering evidence of a legitimate, non-discriminatory reason for the adverse action, that is a concern for the safety of the children. (Plaintiff) failed to prove by a preponderance of the evidence that the reason offered by the employer was merely a pretext for a retaliatory motive." (Conner, 489 S.E. 2d at 791).

10. This particular holding was later affirmed by the Circuit Court of Barbour County. On appeal by the Plaintiff, the Supreme Court of Appeals of West Virginia analyzed de novo the ALJ's conclusions of law and application of law to the facts (Conner, 489 S.E.2d at 790), and affirmed the ALJ's decision denying the portion of Plaintiff's grievance claiming retaliatory discharge (Conner, 489 S.E.2d at 790-91). Citing Frank's Shoe Store v. West Virginia Human Rights Comm'n, 365 S.E.2d 251 (W.Va. 1986), the court outlined the elements of a claim for a prima facie case of unlawful retaliatory discharge under the West Virginia Human Rights Act (Conner, 489 S.E. 2d at 791 (quoting Mace v. Pizza Hut, Inc., 377 S.E. 2d 461, 464 (W. Va. 1988)). The court agreed with the ALJ that "(u)pon the presentation of that legitimate, non-retaliatory motive (involving the safety of the children entrusted to Plaintiff's care), the (Plaintiff) failed to demonstrate that the reasons offered for her discharge were merely a pretext for retaliatory motive." (Conner, 489 S.E.2d at 790-91).

11. The parties to the state action and this Federal action are the same. [3] In both the state action and in this federal action, the ultimate dispositive factual issue is identical: Was Plaintiff's discharge the result of unlawful retaliation by the Board? That issue was specifically and repeatedly resolved against the Plaintiff during the state grievance proceeding, the appeal of the ALJ's decision to the Circuit Court of Barbour County, and the appeal of the Circuit Court's decision to the West Virginia Supreme Court of Appeals. Such resolution of the issue in a court of competent jurisdiction in an action begun by the Plaintiff precludes the subsequent relitigation of that issue in any action between the same parties, whether in a state or federal court. Bound under *res judicata* and collateral estoppel principles by the adverse decision of the West Virginia Supreme Court of Appeals on the dispositive factual issue whether there had been unlawful retaliation in the Board" decision to terminate Plaintiff' employment, there is no factual basis on which the Plaintiff might prevail in her Title VII action.

12. Our Court of Appeals has upheld a district court's application of *res judicata* and collateral estoppel principles in a case much like this one. In Moosavi v. Fairfax County Board of Education, 666

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[3] That Plaintiff has added as additional parties Defendant in this action Barbour County's superintendent of schools, director of transportation, and Plaintiff's immediate supervisor is of no moment. Plaintiff has named those parties in their official capacities, having alleged no conduct outside the scope of their employment. These parties therefore are in privity with the Board in this matter. Moreover, because the case before this Court is based on the same facts and allegations as Plaintiff's state action, Plaintiff could have named these additional Defendants in her state action, but simply failed to do so.

F.2d 58(4th Cir. 1981), the court held that a Plaintiff was collaterally estopped from litigating his claim under Title VII that he had been discriminatorily denied permanent employment because of his national origin where that same action had been resolved against Plaintiff after a full hearing and trial in a state court action seeking injunctive relief and monetary damages. Id. At 59. The district court had held that the issue of whether discrimination had occurred could not be relitigated because of the prior state court judgment resolving that ultimate issue. Id.

13. Plaintiff's state action meets our Court of Appeals' requirements for application of the doctrine of res judicata. The West Virginia Supreme Court of Appeals' decision is indisputably a final judgment on the merits in an earlier suit. There is no doubt that Plaintiff asserted her cause of action for retaliatory discharge in both the state action, and in this one. Finally, the parties or their privies are identical in the state action and in the action before this Court.

14. Likewise, Plaintiff's state action meets the Fourth Circuit's requirements for application of the doctrine of collateral estoppel. The issue precluded (whether Plaintiff's discharge resulted from unlawful retaliation) is identical to the issue previously litigated in Plaintiff's state action. The issue was definitively determined in the prior proceeding when the West Virginia Supreme Court held that no unlawful discrimination had occurred. That determination of the issue was a critical and necessary part of the decision in the prior proceeding, as it resolved an issue directly and properly before the Court which had been resolved by the lower court. There is not dispute that the Supreme Court's decision was final and valid. Finally, Plaintiff had a full and fair opportunity to

litigate the issue in the previous forum. She was represented by counsel, fully aired her version of the facts, and had an opportunity to, and in fact did, seek court review of any adverse findings. Utah Construction, 384 U.S. at 422; Moore, 480 F. Supp. At 383.

15. Although Plaintiff claims this Court should abide not by Fourth Circuit precedent in determining whether her action is barred, but instead should follow the opinion of the Supreme Court of Appeals of West Virginia in Vest v. Board of Education of the County of Nicholas, 193 W. Va. 222, 455 S.E. 2d 781 (1995), the Court rejects this position for two reasons. First, the Court finds the Vest case is factually distinguishable from the case at bar. The plaintiff in Vest had merely pursued a grievance through the West Virginia Education and Grievance Board without the assistance of counsel. Here, Plaintiff not only processed her grievance through the Grievance Board, but also had that Board's conclusions of law reviewed in a *de novo* proceeding before the Circuit Court of Barbour County, and again in a *de novo* proceeding before the Supreme Court of Appeals of West Virginia. The latter tribunal issued a lengthy decision explaining its rationale for rejecting Plaintiff's claims. Moreover, Plaintiff was represented by counsel throughout these proceedings. Second, because this Court's jurisdiction of this case is based on its alleged presentation of a federal question, Am. Compl. ¶7; *see* 28 U.S.C. § 1331, the Court must apply federal law rather than state law in resolving the issues the case presents. *See generally* Erie Railroad Co. v. Thompkins, 304 U. S. 64 (1938); Pye v. Georgia Dep't of Transportation, 513 F.2d 290, 291-92 (5th Cir. 1975).

16. For all these reasons, this Court holds that Plaintiff's claim for retaliatory discharge is barred

by the doctrine of res judicata and the doctrine of collateral estoppel, and dismisses this claim with prejudice.

17. The Board discharged Plaintiff in January, 1995 (Am. Compl. ¶6). Her allegations of sexual harassment surfaced for the first time in this lawsuit. W. Va. Code § 55-2-12 establishes a two-year limitations period for an action based on discrimination cognizable under the West Virginia Human Rights Act. McCourt v. Oneida Coal Co., 188 W. Va. 647. 425 S.E.2d 602 (W. Va. 1992). Thus, to the extent Plaintiff's sexual harassment claim relates to events which took place more than two years before filing of the Complaint, the claim is time barred.

18. Additionally, to the extent Plaintiff intended to state a sexual harassment claim under Title VII, a matter not obvious from the Amended Complaint, the claim is time barred and is additionally barred by Plaintiff's failure to exhaust administrative remedies. Discrimination claims under Title VII must ordinarily be filed with the Equal Employment Opportunity Commission within 180 days of the date on which the alleged unlawful employment practice occurred. 42 U.S.C. § 2000e-5(e)(1). However, if the alleged discrimination took place in a state or locality that has its own anti-discrimination laws and an agency to enforce those laws, then the time period for filing claims with the Commission is extended to 300 days. 42 U.S.C. § 2000e-5(e)(1); *see generally* Mohasco Corp. v. Silver, 447 U. S. 807 (1980). Title VII requires additionally that before the 180-day period is extended to 300 days, the person bringing the charge must initially institute proceedings with the state agency. 42 U.S.C. § 2000e-5(e)(1).

19. Because neither Plaintiff's Amended Complaint nor any other documents before this Court indicate that Plaintiff has complied with

these requirements, the Court holds that Plaintiff's sexual harassment claim is barred by the statute of limitations and by Plaintiff's failure to exhaust administrative remedies.

20. The Court understands from representations made by Plaintiff's counsel at the hearing in this matter that Plaintiff objects to the Court's dismissal of her sexual harassment claim and wishes to present evidence on this claim for the Court's consideration in the form of a Motion For Reconsideration. The Court will entertain such a motion from the Plaintiff and directs that any Motion for Reconsideration be filed no later than 30 days following May 20, 1999.

For all of these reasons, the Court **ORDERS** this case is **DISMISSED WITH PREJUDICE** and stricken from the docket.

The Clerk is directed to send a copy of this Dismissal Order to counsel.

ENTER: May 17, 1999.
s/Robert E. Maxwell
Hon. Robert E. Maxwell
Senior District Judge

APPENDIX D

Vest v Board of Education of County of Nicholas 455 S. E. 2d 781 (W.Va. 1995) 193 W. Va. 222

Barbara L. VEST, Plaintiff,

v.

The BOARD OF EDUCATION OF THE COUNTY OF NICHOLAS,

Defendant

No. 22547.

Supreme Court of Appeals of West Virginia.
Submitted Jan. 18, 1995.
Decided Feb. 17, 1995.

On certified questions from the United States District Court for the Southern District of West Virginia, the Supreme Court of Appeals, Cleckley, J., held that: (1) West Virginia Education and State Employees Grievance Board has jurisdiction to remedy discrimination that would also violate the West Virginia Human Rights Act, and (2) civil action filed under the Human Rights Act is not precluded by prior grievance decided by the Board arising out of the same facts and circumstances.

Answered and dismissed.

1. **Officers and Public Employees**
Key: 72.33(1)

Although West Virginia Education and State Employees Grievance Board does not have authority to determine liability under the West Virginia Human Rights Act, Board's authority to provide relief to employees for "discrimination,"

"favoritism," and "harassment," as those terms are defined in statute, includes jurisdiction to remedy discrimination that also would violate the Human Rights Act. Code, 5-11-1 et seq., 18-29-2.

2. Administrative Law and Procedure
Key 501

For issue or claim preclusion to attach to quasi-judicial determinations of administrative agencies, at least where there is no statutory authority directing otherwise, prior decision must be rendered pursuant to agency's adjudicatory authority and jprocedures employed by agency must be substantially similar to those used in court; in adddition, identicality of the issues litigated is a key componment to application of administrative res judicata or collateral estoppel.

3. **Administrative Law and Procedure**
Key 501
Officers and Public Employees
Key 72.33(1)

Civil action filed under the West Virginia Human Rights Act is not precluded by prior grievance decided by the West Virginia Education and State Employees Grievance Board arising out of same facts and circumstances, as issues are not identical, and procedures employed by Board are not substantially similar to those employed by either court of law or the Human Rights Commission. Code, 5-11-1 et seq.

Syllabus by the Court

1. The West Virginia Education and State Employees Grievance Board does not have authority to determine liability under the West Virginia Human Rights Act, W. VA. Code, § 5-11-1, *et seq.*; nevertheless, the Grievance Board's authority to provide relief to employees for

"discrimination," "favoritism,"and "harassment," as those terms are defined in W. Va. Code, 18-29-2 (1992), includes jurisdiction to remedy discrimination that also would violate the Human Rights Act.

2. For issue or claim preclusion to attach to quasi-judicial determinations of administrative agencies, at least where there is no statutory authority directing otherwise, the prior decision must be rendered pursuant to the agency's adjudicatory authority and the procedures employed by the agency must be substantially similar to those used in a court. In addition, the identicality of the issues litigated is a key component to the application of administrative *res judicata* or collateral estoppel.

3. A civil action filed under the West Virginia Human Rights Act, W. Va. Code 5-11-1, et seq., is not precluded by a prior grievance decided by the West Virginia Education and State Employees Grievance Board arising out of the same facts and circumstances.

Mike Kelly, Charleston, for plaintiff.

Charles R. Bailey, Belinda B. Neal, Shuman, Annand & Poe, Charleston, for defendant.

Jeffrey G. Blaydes, James M. Haviland, Crandall, Pyles & Haviland, Charleston, for amicus curiae W. Va. Educ. Ass'n.
Paul R. Sheridan, Sr. Asst. Atty. Gen., Charleston, for amicus curiae W. Va. Human Rights Com'n

CLECKLEY, Justice:

This case involves two questions certified to us by the United States District Court for the Southern District of West Virginia involving the authority

of the West Virginia Education and State Employees Grievance Board (Grievance Board) to hear a gender-based discrimination claim.

I.

FACTS

The plaintiff, Barbara L. Vest, served as a substitute teacher at Summersville Junior High School in Nicholas County. The plaintiff asserts she was terminated from that position on the basis of pregnancy and sex. The plaintiff filed a grievance against the defendant, the Board of Education of the County of Nicholas, with the Grievance Board. At a level IV grievance hearing. The plaintiff presented evidence in support of her discrimination claim. However, in her post hearing brief, the plaintiff voluntarily relinquished her claim upon her belief that it was not the proper forum to hear her discrimination claim. At the hearing, the plaintiff was not assisted by a lawyer, but was assisted by a "representative" as permitted by W. Va. Code, 18-29-3(f) (1985).[1] By decision dated May 20, 1992, the plaintiff's grievance was denied. The decision contained no conclusions of law with regard to the plaintiff' discrimination claim.[2]

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[1] W. Va. Code, 18-29-3(f), provides, in part: "An employee may have the assistance of one or more fellow employees, an employee organization representative or representatives, legal counsel or any other person in the preparation and presentation of the grievance." A "representative" is defined in W. Va. Code, 18-29-2®(1985), as "any employee organization, fellow employee, legal counsel or other person or persons designated by the grievant as the grievant's representative."

[2] The language quoted from these sections is identical to the current versions enacted in 1992. The plaintiff's claim was denied on the grounds she, *inter alia*, was not dismissed as a substitute, failed to establish her right to be retained in a specific position at the school, and failed to demonstrate she had a fundamental property or liberty interest in her substitute assignment. On May 2, 1994, the Circuit Court of Kanawha

Subsequently, on June 12, 1992, the plaintiff filed her discrimination claim with the United States Equal Employment Opportunity Commission (EEOC). According to the plaintiff, the EEOC determined there was probable cause under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq., and issued the plaintiff a Notice of Right to Sue on July 20, 1993. Thereafter, the plaintiff filed an action in the federal district court against the defendant under the Civil Rights Act and the West Virginia Human Rights Act, W. Va. Code, 5-11-1, *et seq.* The defendant filed a motion for summary judgment with the district court arguing the discrimination claim was barred by the doctrines of *res judicata* and collateral estoppel because of the plaintiff's previous hearing before the Grievance Board. The following questions then were certified to this Court:

1. "Does the West Virginia Education and State Employees Grievance Board ('Grievance Board') have subject matter jurisdiction over claims alleging discrimination because of gender-based discrimination?

2. "If the Grievance Board has such jurisdiction, is a civil action filed pursuant to the West Virginia Human Rights Act precluded by a prior grievance proceeding involving the same parties and arising out of the same facts and circumstances, but which did not result in any findings of fact or conclusions of law regarding the discrimination claim?"

After review, we answer the first certified question in the affirmative and the second certified question in the negative.

County affirmed the level IV decision. The plaintiff's petition for appeal filed with this Court was denied on November 29, 1994.

II.

GRIEVANCE BOARD'S SUBJECT MATTER JURISDICTION

(1) The Legislature established the grievance procedure in W. Va. Code, 18-29-1, *et seq.*, to provide the State's education employees with "a simple, expeditious and fair process for resolving (employment) problems(.)" W. Va. Code, 18—29-1 (1992); *see Triggs v. Berkeley County Bd. of Educ.*, 188 W. Va. 435, 425 S.E.2d 111 (1992); *Fayette County Bd. of Educ. V. Lilly*, 184 W. Va. 688, 403 S.E.2d 431 (1991). Under W. Va. Code, 18-29-5(a) (1989), the Grievance Board is created and is directed to employ hearing examiners to conduct and decide level IV hearings, as provided in W. Va. Code, 18-29-4 (1992). W. Va. Code, 18-29-5(b) (1989), authorizes the hearing examiners to "provide such relief as is deemed fair and equitable in accordance with the provisions of (article twenty nine.)" Grievances, according to W. Va. Code, 18-29-2(a) (1992), may include claims by employees alleging "discrimination" in the application or interpretation of written rules or procedures, "discrimination" in the "application of unwritten policies or practices of the board, (and) any specifically identified incident of harassment or favoritism(.)" W. Va. Code, 18-29-2 (19092), also defines the following terms for purposes of article twenty-nine:

"(m) 'Discrimination' means any differences in the treatment of employees unless such differences are related to the actual job responsibilities of the employees or agreed to in writing by the employees.
"(n) 'Harassment' means repeated or continual disturbance, irritation or annoyance of an employee which would be contrary to the demeanor expected by law, policy and profession.

"o) 'Favoritism' means unfair treatment of an employee as demonstrated by preferential, exceptional or advantageous treatment of another or other employees."

Thus, the Grievance Board, through its hearing examiners, has "jurisdiction" to decide grievances that include claims of discrimination, harassment, and favoritism which have the potential to overlap claims under the Human Rights Act. The latter prohibits discrimination in public and private employment on the basis of race, religion, color, national origin, ancestry, sex, age, blindness, or handicap. W. Va. Code, 5—11-9 (1992). The two statutes may, in a given case, provide alternative remedies to aggrieved persons. Obviously, a state educational employee who is denied a job benefit solely because of her gender would have a meritorious grievance based on either "discrimination" or "favoritism" and also would have a claim for relief under the Human Rights Act. Similarly, a victim of sexual harassment would be entitled to relief in a grievance that alleged "harassment" [3] and in a claim (administrative or judicial) under the Human Rights Act. *E.g., Westmoreland Coal Co. v.*

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[3] We are aware that the Grievance Board in *Connor v. Barbour County Board of Education*, No. 93-01-154 (1994), a decision by an administrative law judge, has stated it has no jurisdiction to entertain sexual harassment claims. *See also Norton v. West Virginia Northern Community College*, No. 89-BOR-503 (1993). As should be clear from the ensuing discussion in the text, the Connor decision is correct to the extent that it holds the Grievance Board has no authority to decide whether an employer has violated the Human Rights Act. However, harassing treatment of an employee does not fall outside of "harassment" within the meaning of *W. Va. Code 18-29-2*, simply because it is motivated by or related to the victim's sex. In a grievance under *W. Va. Code 18-29-1, et seq.*, an employee alleging harassment only needs to prove harassment. The motivation or nature of the harassment is irrelevant.

West Virginia Human Rights Comm'n, 181 W. Va. 368, 382 S.E.2d 562 (1989). These overlapping remedies lead to issues, such as are presented in this case, where we must reconcile the goals of various statutory schemes with the policies[4] supporting the doctrines of claim and issue preclusion doctrines.

Clearly, the Grievance Board's authority extends only to resolving grievances made cognizable by its authorizing legislation, that is, those grievances recognized in W.Va. Code, 18-29-2. Just as certainly, there is no authority in the statute for the Grievance Board to decide whether a person states a claim under the Human Rights Act. In fact, W. Va. Code, 5-11-10 (1994), W. Va. Code, 5-11-11 (1989), and W. Va. Code, 5-11-13 (1983), commit interpretation and enforcement of the Human Rights Act to the Human Rights Commission and to the courts of this State. *Price v. Boone County Ambulance Auth.*, 175 W. Va. 676, 337 S.E. 2d 913 (1985).

On the other hand, the Grievance Board can entertain grievances claiming that a particular employment action was the result of discrimination based on sex or any of the other prohibited motivations listed in the Human Rights Act. If a grieving employee can prevail on the

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[4] As we previously stated In *Mellon-Stuart Co. v. Hall*, 178 W. Va. 291, 298, 359 S.E.2d 124, 131 (1987): "[R]es judicata [or claim preclusion] serves to advance several related policy goals—(1) to promote fairness by preventing vexatious litigation; (2) to conserve judicial resources; (3) to prevent inconsistent decisions; and (4) to promote finality by bringing litigation to an end. *E.g.*, *Pitsenbarger v. Gainer*, 175 W. Va. 31, 330 S.E.2d 840 (1985); *Conley v. Spillers*, 171 W. Va. 584, 301 S.E.2d 216 (1983)." Collateral estoppel or issue preclusion "is supported by the same public policy considerations as res judicata." 178 W.Va. at 299, 359 S.E.2d at 132, *citing Conley*, 171 W.Va. at 588, 301 S.E.2d at 220.

claim that she has been the victim of "discrimination." "harassment," or "favoritism," it necessarily follows that the employee also can prevail by showing that the "discrimination," harassment," or "favoritism," was motivated by sexual, racial, or some other invidious ground. Conversely, an employment decision that treats an employee differently because of the employee's race or gender, etc., is, by definition, not one that is "related to the actual job responsibilities of the (employee.)" W.Va. Code, 18-29-2(m).

For example, as a practical matter, a grievant who has persuasive evidence that sexual or racial bias entered into an employment decision may want to present such evidence at a grievance hearing both to prove "discrimination" and to rebut the employer's neutral or job-related explanation for its action. To hold that a grievant could not present evidence of an illicit motive to help prove "discrimination" just because such motive also is prohibited by the Human Rights Act would be both unfair to the grievant and inefficient for our administrative and judicial systems. It would be unfair to the grievant because it artificially would limit probative evidence relevant to discrimination. It would be inefficient because a grievance decision in favor of the grievant may, in many cases, end the controversy and preclude the need for further administrative or judicial proceedings under the Human Rights Act; and, it does so by a procedure that is much faster and less expensive.

Thus, the answer to the District Court's first certified question is in the affirmative. The Grievance Board does not have authority to determine liability under the Human Rights Act, W. Va. Code, 5-11-1, *et seq.*; nevertheless, the Grievance Board's authority to provide relief to employees for "discrimination," "favoritism," and "harassment," as those terms are defined in W.Va

Code, 18-29-2 (1992), includes jurisdiction to remedy discrimination that also would violate the Human Rights Act. In other words, the Grievance Board does have subject matter jurisdiction over gender-based discrimination claims—just as it has subject matter jurisdiction over any claim of discrimination, meaning employment decisions that are not based on job-related reasons or agreed to in writing by the employees. "Discrimination," "favoritism," and "harassment" in W. Va. Code, 18-29-2, comprise, *inter alia*, employment discrimination that also is prohibited by the Human Rights Act. Accordingly, we must proceed to answer the District Court's second certified question.

III.

(2) We have held that for preclusion to attach to quasi-judicial determinations of administrative agencies, at least where there is not statutory authority directing otherwise, [5] the prior "decision must be rendered pursuant to the agency's adjudicatory authority and the procedures employed by the agency must be substantially similar to those used in a court(.)" *Liller v. West Virginia Human Rights Comm'n*, 180 W. Va. 433, 440, 376 S.E.2d 639, 646 (1988). In addition, "(t)he identicality of issues litigated is a key component to the application of administrative res judicata or collateral estoppel(.)" 180 W. Va. At 440, 376 S.E.2d at 646. Using that analysis, we find no preclusive effects to the Grievance Board's determinations over human rights claims.

[5] Nothing in either of the relevant statutes, W. Va. Code 5-11-1, *et seq.*, and W. Va. Code, 18-29-1, *et seq.*, expressly resolves the preclusion issues presented by the District Court's second certified question.

(3) First, there are not identical issues. As we stated above, a "discrimination" claim under W. Va. Code, 18-29-2(m), only need establish that the adverse employment decision was neither job related nor agreed to by the employees. Section 2(m) imposes no requirement for proving that the "discrimination" was caused by an illicit motive or was the result of a discriminatory policy having a disparate impact, [6] as would be the case under the Human Rights Act. *E.g., University of West Virginia v. Decker*, 191 W. Va. 567, 447 S.E.2d 259 (1994). Thus, claim preclusion would apply only if we were to hold that subsequent litigation by grievants of claims arising out of the same facts as their grievances is barred not only as to arguments actually litigated, but also as to those that could have been litigated in the grievance. *See* Syl. pt.2, *Conley v. Spiller*, 171 W. Va. 584, 301 S.E.2d 216 (1983); *Lane v. Williams* 150 W. Va. 96, 100, 144 S.E.2d 234, 236 (1965). As we did in *Liller*, [7] *supra*, we refuse to impose such a bar on subsequent litigation under the Human Rights Act. Employees appearing before the Grievance Board may have legitimate reasons for not raising the more difficult and far more contentious issue of discriminatory motive, and because many grievants lack the assistance of a lawyer, they may not even recognize the potential for a human rights claim. By not imposing a collateral bar, we reinforce the Legislature's purpose in enacting W. Va. Code, 18-29-1, *et seq.*, of creating a simple and expeditious procedure for resolving employees' grievances.

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[6] It is by no means certain that a disparate impact claim would be cognizable before the Grievance Board. Given our disposition of the certified questions presented and the fact this case did not involve such a claim, we need not address the issue here.

[7] *Liller* involved the question whether a Deputy Sheriffs' Civil Service Commission's decision regarding a discharge precluded a subsequent human rights action concerning the same facts. We held that, because the civil service commission had not ruled on the employee's

The second reason that causes us to reject claim preclusion also persuades us that issue preclusion should not apply. The procedures employed by the Grievance Board are not substantially similar to those employed by either a court of law or the Human Rights Commission and the differences are of profound significance. Thus, even if a grievance hearing examiner concludes that an employer's adverse action to a grievant was not "discriminatory," but was job related, that determination is not binding on a court or the Commission deciding a claim under the Human Rights Act—regardless of whether the grievant alleged or adduced evidence of discriminatory motive or disparate impact at the grievance hearing and regardless of whether the Grievance Board made a determination about such issues.

As noted above, the Legislature designed the grievance process to be simple and expeditious. Consequently, the process is streamlined and lacks many of the adversarial accoutrements found in judicial and Commission's proceedings. In the vast majority of grievances, for example, the grievant is not represented by a lawyer. Moreover, and more importantly, the grievance process does not provide for any of the discovery mechanisms available under the Rules of Civil Procedure and the Commission's procedural rules. [8] Finally, in stark contrast to the Human Rights Act, the grievance statute does not provide for the right to an independent investigation of each grievance

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[8] We note that in *Mellon-Stuart Co. v. Hall*, 178 W. Va. 291, 300, 359 S.E.2d 124, 133 (1987), where we accorded preclusive effect to the decisions of the court of claims, we emphasized that the court of claims maintains procedural and discovery rules similar to those that govern our courts.

filed before the Board, [9] does not make available at public expense representation by a lawyer for cases that proceed to a hearing before an administrative law judge, [10] and does not give employees the option of skipping the administrative process and pursuing their claims *de novo* in circuit court where jury trials and the full array of legal and equitable remedies are obtainable.[11]

The issues in a human rights case—especially unlawful motive and disparate impact—are extremely difficult and often complex. Invariably, they require substantial degrees of fact gathering and familiarity with the concepts of discrimination law. A grievant without a lawyer could not possibly be expected to grasp the significance of that law, put together a case of discrimination, and comprehend the full impact of claim and issue preclusion doctrines. A grievant with a lawyer would have an unfairly difficult task trying to prove illicit motive or disparate impact without access to the full panoply of discovery opportunities. The problem especially is apparent by the fact that in matters of motive and disparate impact the employer ordinarily possesses the crucial evidence. Thus, in the language of Syllabus Point 3, in part, of *Mellon-Stuart Co. v. Hall*, 178 W.Va. 291, 359 S.E.2d 124

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[9] W.Va. Code, 5-11-10 (1994), directs the Commission to investigate all claims filed with it. *See Allen v. State Human Rights Commission*, 174 W.Va. 139, 324 S.E.2d 99 (1984).

[10] By virtue of W. Va. Code, 5-11-7 (1967), the State prosecutes all claims in which probable cause is found and in which the complainant is not represented by private counsel, and the Attorney General has a mandatory duty to furnish all legal services required by the Commission. *Allen, supra.*

[11] *See* W. Va. Code, 5-11-13 (1983); *Price v. Boone County Ambulance Auth.., supra.* Jury trials, of course, are not available in the administrative process; and, because of that fact, a complainant's recovery before the Commission is limited to equitable relief and may not include large awards for emotional distress or punitive damages. *Bishop Coal Co. v. Salyers*, 181 W.Va. 71, 380 S.E.2d 238 (1989).

(1987), the plaintiff in this case was not "afforded a full and fair opportunity to litigate the matters in dispute(.)"

We stated in *Liller*, 180 W.Va. at 441, 376 S.E.2d at 647, "that where separate legislative enactment's exist which provide separate administrative remedies, preclusive doctrines will not necessarily be applied. *See Collins v. Elkay Mining Co.*, 179 W. Va. 549, 371 S.E.2d 46 (1988); *Davis v. Kitt Energy Corp.*, 179 W.Va. 37, 365 S.E.2d 82 (1987); *Wiggins v. Eastern Associated Coal Corp.*, 178 W.Va. 63, 357 S.E.2d 745 (1987)." Indeed, our cases require us to determine "whether applying the doctrines (of preclusion) is consistent with the express or implied policy in the legislation which created the body." Syllabus Point 3, in part, *Mellon-Stuart Co., supra.* In this case, we have W. Va. Code, 18-29-1, *et seq.*, a legislatively provided administrative remedy for state employees that is designed to assure them of a fast, easy-to-use and inexpensive procedure for resolving the entire spectrum of legitimate employee complaints. We also have in the Human Rights Act a complex array of procedures and protections designed to give effect to the "civil right of all persons" to equal employment opportunity and to end the invidious discrimination that "is contrary to the principles of freedom and equality of opportunity and is destructive to a free and democratic society." W. Va. Code, 5-11-2 (1989). We think our answers to the certified questions best accommodate the different legislative goals that support the two statutes involved in this case.[12]

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[12] We note that the United States Supreme Court has reached similar conclusions in order to give full effect to Congress's purposes in enacting Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq. E.g., University of Tennessee v. Elliott*, 478 U.S. 788, 106 S.Ct. 3220, 92 L.Ed.2d 635 (1986) (A judicially unreviewed state administrative decision on a claim of race discrimination does not bar subsequent Title VII litigation of the same claim); *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 94 S.Ct. 1011, 39 L.Ed.2d 147 (1974)(a grievance decision applying an anti-discrimination provision in a collective

In so holding, we particularly remain mindful of the primacy that the Legislature has accorded to eliminating invidious discrimination in this State. As we stated in *Allen v. State Human Rights Commission*, 174 W.Va. 139, 149, 324 S.E.2d 99, 109 (1984), "(e)qual opportunity in this State is a fundamental principle" grounded in several provisions of our State Bill of Rights. "(E)very act of unlawful discrimination in employment...is akin to an act of treason, undermining the very foundations of our democracy." 174 W.Va. at 148, 324 S.E.2d at 108. The sense of betrayal is even greater when the discriminator is, as alleged in this case, a public servant. We cannot allow the substantial protections promised by the Human Rights Act from such assaults on our personal and institutional integrities to be compromised by unthinking adherence to technical doctrines. If we permit public employers to use prior decisions rendered by a loose administrative apparatus—engaged in by unwary and often uncounseled employees and lacking important procedural rudiments—to preclude victims of discrimination from subsequently invoking the promises made by the Human Rights Act, we, thereby, would add our own breach of trust to those already committed by public discriminators. Thus, we refuse to so hold.[13]

We, therefore find it unnecessary to resolve the dispute between the parties in the present case as

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bargaining agreement does not preclude subsequent Title VII litigation on the same set of facts).

[13] Our statements in the text, of course, should not be construed to express any opinion on the merits of the plaintiff's charges of discrimination in this case. Rather, we merely hold that the Human Rights Act entitles her to a full and complete opportunity to prove those allegations before the Commission or a trial court.

to whether the plaintiff "actually litigated" her discrimination claim before the Grievance Board.[14]

Accordingly our response to the District Court's second certified question is negative. A civil action filed under the Human Rights Act is not precluded by a prior grievance decided by the Grievance Board arising out of the same facts and circumstances. The grievance procedures and the Human Rights Act provide enforcement mechanisms to accomplish different legislative purposes and neither preempts the other.[15]

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[14] As noted above, at the level IV grievance hearing the plaintiff presented evidence on discrimination, but then "relinquished" the claim in her post-hearing brief before the issue was decided. *Liller* would seem to dictate a finding that the Grievance Board's decision, therefore, would not preclude a subsequent Human Rights Act complaint. The issue in *Liller* was whether a decision of a civil service commission should be given preclusive effect. We concluded that "where the issue of sex discrimination *has not been decided* by a deputy sheriff civil service commission, the involved deputy is not foreclosed from filing a complaint with the human rights

[15] We emphasize, however, that employees can recover only once for each injury. Thus, for example, if the Grievance Board awards back pay to a discharged employee who later, based on the same set of facts, prevails on a Human Rights claim, the grievance award would be set off against the employee's recovery under the Human Rights Act.

IV

CONCLUSION

For the foregoing reasons, we find the West Virginia Education and State Employees Grievance Board has subject matter jurisdiction over any claim of discrimination, and a civil action filed under the Human Rights Act is not precluded by such a prior grievance which involves the same facts and circumstances. The certified questions answered, this case is dismissed.

Answered and dismissed.
BROTHERTON, J., did not participate.
FOX, J., sitting by temporary assignment.